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In the Supreme Court of the United States

OCTOBER TERM, 1984

JOE G. GARCIA, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE SECRETARY OF LABOR ON REARGUMENT

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In view of the exhaustive briefing that the issues in this case have already received, we focus this reply

brief on several recurring themes in appellees' supplemental briefs that reflect a fundamentally flawed understanding of the relationship between the federal government and the states respecting regulation of activities affecting interstate commerce.

1. Appellees do not question that the regulation of minimum wages and overtime compensation paid to employees of mass transit operators pursuant to the Fair Labor Standards Act is a proper exercise of Congress's Commerce Clause authority. Nor do they question that, pursuant to the explicit command of the Supremacy Clause, such legislation enacted under the Commerce Clause binds all within the jurisdiction of the United States and overrides inconsistent state law.

Notwithstanding these moderate introductory premises, however, appellees would ultimately transmute the carefully delimited "functional doctrine" recognized in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and its progeny into "a sacred province of state autonomy" of unlimited scope—a notion that the Court has previously rejected (*EEOC* v. *Wyoming*, 460 U.S. 226, 236 (1983)). This remarkable transformation is to be accomplished by effectively stripping the intergovernmental immunity doctrine of any requirement that challenged federal legislation be shown to "undermine the role of the states in our federal system" by displacing "basic state prerogatives" in a manner that threatens the very vitality of the states (*United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678, 686-687 (1982)).

We appreciate that the development of a complex, modern, interdependent, industrial economy has the

practical effect in the twentieth century of lending to Congress's power to regulate commerce an impact on "local" activities that exceeds the impact of federal legislation on such activities in the eighteenth century. But it is also true that the states have dramatically expanded *their* activities in this interval, thrusting themselves into roles that substantially affect interstate commerce. In order to provide a wide range of services unknown to the Framers, states today employ a vast labor force that constitutes a major segment of the labor market; state services represent a key sector of the national economy. See *Fry* v. *United States*, 421 U.S. 542, 548 (1975). Against this backdrop of evolving forms of interdependence in the national economy, and overlap in the exercise of state and federal powers, the governing constitutional standard must protect the distinctive attributes of state sovereignty while giving intended effect to the explicit authority conferred upon Congress to regulate interstate commerce in the public interest.

Thus, in our briefs filed last Term, we explained that the central vice of the Fair Labor Standards Amendments of 1974, which were struck down in *National League of Cities* insofar as they applied to certain "traditional governmental functions," was the abrupt federal intrusion affecting the organization of core services that had been firmly entrenched in the public sector long before the enactment of the Fair Labor Standards Act. These Amendments disrupted a wide range of settled patterns of state and local government administration. No similar intrusion results from the application of the FLSA to the public sector of the transit industry. Transit has traditionally been a private sector activity. Widespread

public sector participation is a recent development, resting, to a significant degree, on the availability of substantial federal subsidies. Moreover, Congress found that absent federal minimum wage regulation public transit carriers were competing on unfair terms with private carriers.

As we explained in our supplemental brief filed this Term, unless state services and patterns of operation are entrenched prior to the development of a federal regulatory presence in the field, federal legislation applicable to state activities cannot be said to displace state prerogatives or to impair the vitality of the states. This carefully tailored conception of the scope of intergovernmental immunity is dictated by the nature of that doctrine as a "functional" one designed to safeguard the essential attributes of state sovereignty (*Wyoming*, 460 U.S. at 236), while at the same time preserving federal authority against erosion (*Long Island R.R.*, 455 U.S. at 687). It is also congruent with the doctrine of implied state immunity from federal taxation, which teaches that the states may not, by expanding their field of operations, deprive federal power of its "accustomed and reasonable scope" (*New York* v. *United States*, 326 U.S. 572, 589 (1946) (opinion of Stone, C.J.)).

Appellees, however, would dispense with a showing of displacement of basic state decisions regarding organization of integral operations as a precondition for operation of the immunity doctrine. Appellees would thus adopt the rule that Acts of Congress, although within the proper confines of the commerce power, may be "pre-empted" by the states. Under appellees' view, the states remain essentially free to enter a field subject to federal regulation and to interpose a portable immunity, thereby depriving con-

gressional authority to regulate commerce of its "accustomed and reasonable" ambit. Appellees thus reject the teaching of the tax immunity cases, discard the requirement that a federal intrusion into the domain of established state activity be shown, and abandon protection for the established scope of congressional power.

To be sure, appellees seek to temper their radical doctrine of state pre-emption of federal law by suggesting various considerations to be weighed in assessing the states' claims of immunity. See APTA Supp. Br. 45-46 & n.81; SAMTA Supp. Br. 38 n.28, 43, 46 n.33. But even assuming that these tests supply a workable limit upon state pre-emption of federal authority (but see pages 6-8, *infra*), they do not justify the operation of this unprecedented doctrine even within its delimited scope. The various tests proposed by appellees at best provide some measure of the strength of the states' interest in offering a particular service. As *Long Island R.R.* reveals (455 U.S. at 686-687), however, the reasonableness of state participation in a given field of service does not control the federalism question. Absent the displacement of settled patterns of state organization in established service areas—the form of regulation that is presumptively interdicted under *National League of Cities*—there is no reason why states entering fields of activity affecting interstate commerce should be insulated from nondiscriminatory federal regulatory legislation.[1]

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[1] Appellees' response to the analysis we have proposed is largely to condemn it as a "static historical test" (APTA Supp. Br. 43-44; SAMTA Supp. Br. 39). But this epithet is simply inaccurate; the rule we propose accords the states substantial latitude to expand their operations free of federal regulation. See Gov't Supp. Br. 21-23. The only element of

2. The standards proposed by appellees to place some limit upon state pre-emption of Congress's Commerce Clause authority are subjective, shifting in their application, difficult to administer and, in the final analysis, simply unrelated to the federalism interests of the states that *National League of Cities*

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stasis introduced by our formulation of the scope of state immunity concerns the constitutional validity of Acts of Congress regulating activity affecting commerce, which could not be placed in jeopardy simply because the states have expanded their services.

Equally unfounded is appellees' suggestion (APTA Supp. Br. 44-45) that the test we propose threatens the states' ability to expand their activities into areas that have been regulated by Congress. Wage and overtime standards such as those in the FLSA have no such exclusionary effect. They merely require the states entering a field of service to abide by nondiscriminatory worker protections applicable to all other employers in the field.

Appellees also contend that their radical restructuring of the intergovernmental immunity doctrine is necessary to prevent enactment of a host of draconian measures ostensibly waiting in the wings. See, *e.g.*, SAMTA Supp. Br. 26; Nat'l Inst. Mun. Law Officers Supp. Br. 8. But, as Justice Frankfurter cautioned in *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 490 (1939), enduring constitutional doctrine cannot be premised on " 'pernicious abstractions,' " such as hypothetical federal legislation dictating to the states "how many policemen should be on the streets of our cities, and what type of shoes they should wear." It should not be casually presumed that such legislation would ever be enacted. See SAMTA Supp. Br. 35 & n.27, discussing various unenacted bills to amend the FLSA. Should our confidence in Congress's appreciation of the limits of its competence and the importance of federalism ever prove unwarranted, the resulting legislation might well fail constitutional scrutiny, quite apart from the doctrine of intergovernmental immunity. See *Maryland* v. *Wirtz*, 392 U.S. 183, 196 (1968); *Panhandle Oil Co.* v. *Mississippi, ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

was intended to safeguard. For instance, notwithstanding APTA's blithe assurance that immune functions are "readily identifiable" (Supp. Br. 42), APTA ultimately proposes that a court confronted with a claim of state immunity "look to various indicators" (Supp Br. 45), "including" five factors that are prominently listed (Supp. Br. 45-46) and others that are buried in footnotes or merely incorporated by reference (Supp. Br. 46 n.81). Among the factors mentioned are significant intractable economic questions, such as whether the service can be provided by the private sector and whether the service can be delivered at a profit. They also include important policy judgments, such as whether abandonment of the service is an unacceptable alternative. These kinds of issues fit more comfortably within the legislative than the judicial sphere, because of the institutional resources and policy-making capacity required to resolve them. Nor is there any reason to believe that the answers to these questions will remain constant over time. Thus constitutional doctrine would be erected on a foundation of sand and would be whipsawed by a changing economic or social climate, burdening both the courts, which would have to reassess periodically the scope of federal authority to regulate a given field of commerce, and litigants, who would be deprived of the very advantages of stability in the law touted by appellees elsewhere in their argument (APTA Supp. Br. 15-16 n.13).

Appellees evidently—and quite understandably—hesitate to follow the novel doctrine of state preemption of federal Commerce Clause authority to its logical conclusion. See, *e.g.*, SAMTA Supp. Br. 38 n.28; APTA Supp. Br. 46 n.81. At the same time, they rule out all consideration of whether challenged federal regulatory legislation disrupts established

patterns of state or local government organization, thus abandoning the functional rationale for the *National League of Cities* holding. As we have already observed (page 5, *supra*), the categorical tests appellees have proposed for defining the scope of state immunity fail to measure the threat, if any, posed to state sovereignty by application of nondiscriminatory federal regulation of activities affecting interstate commerce, but at best measure only the justification for the states' choice to enter the field. Ironically, the subjective multi-factor tests appellees would apply to limit the corrosive doctrine of state pre-emption would result in federal courts second-guessing the decisions of state and local governments as to the services that they should provide to their residents. Under our federalist system, however, that is precisely the kind of issue that ordinarily ought to be reserved for state decision. On the other hand, the decision of a state to undertake activities previously within the private sector that affect interstate commerce, whether undertaken for reasons that are objectively compelling or for reasons that might be deemed frivolous, idiosyncratic, or short-sighted, affords no justification for depriving Congress of its unquestioned constitutional authority to regulate interstate commerce in accordance with its sovereign judgment as to the requirements of the public interest.[2]

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[2] Appellees deny (APTA Supp. Br. 40-41; SAMTA Supp. Br. 37-39) that the policies underlying the FLSA apply to their own operations. But Congress has explicitly considered this very question and reached the opposite conclusion. See Gov't Opening Br. 47-48. The Commerce Clause, moreover, is, first and foremost, a grant of plenary authority to Congress to determine what regulation of commerce the public interest requires. Cf. *Heart of Atlanta Motel, Inc.* v. *United States*, 379

In sum, the principal defect of the tests advanced by appellees and their amici is that their consideration of adverse impacts upon sovereign prerogatives is one-sided. They correctly recognize that the existence of two sets of governments in a federal system poses a potential threat to the "wide latitude" that states must have "in making * * * policy choices." SAMTA Supp. Br. 33. But they fail to acknowledge that this threat runs in both directions. The federalism underpinnings of the Constitution must accommodate not only policy choices made by the states in the exercise of their powers, but also those made by Congress in the exercise of its enumerated powers. An absolute guarantee to either the states or the federal government of "wide latitude in making * * * policy choices" within the proper spheres of their respective law-making authority will necessarily impinge on the sovereign prerogatives of the other.

The great strength of the Court's test, established in *National League of Cities* and *Hodel* v. *Virginia*

U.S. 241, 258-259, 261-262 (1964). Substantial deference is accordingly due to Congress's judgments in this field. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-277 (1981). Furthermore, the congressional determination that the salutary policy of preventing unfair competition requires application of the FLSA to public as well as private mass transit carriers is one that the courts lack special competence to assess. Appellees would nevertheless discount the very congressional judgment that led to the enactment of the challenged legislation, analyzing the case much as though Congress had never acted and the question were accordingly whether state laws or actions burden interstate commerce to such a degree that they run afoul of the "dormant" Commerce Clause. See also Am. Br. of California, et al. 44-45 & n.19 (relevant inquiry is: "How much of a burden on interstate commerce is created by exempting publicly employed transit workers from the FLSA?").

Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), and reaffirmed many times since, is that it directly responds to the core problem: two sets of sovereigns whose complete and uninhibited exercise of sovereign power inevitably would bring them into conflict on occasion. It simply will not do to assert the obvious—that essential attributes of state sovereignty must be preserved—without adding the equally obvious: that the constitutional test must recognize the attributes and responsibilities of *both* sovereigns. Since the problem arises from the tension between competing sovereign prerogatives, the optimum solution is not a per se or nearly per se approach that disregards one of those sovereigns. Appellant Garcia's analysis addresses the problem from the national perspective. The various tests advanced by appellees and their amici proceed from the state and local perspective. The Court should instead adhere to the test set forth in *National League of Cities* and *Virginia Surface Mining*, as clarified in our supplemental brief, which provides a structured and workable framework that takes both perspectives into account.

For the foregoing reasons, and the reasons set forth in our previously filed briefs, the judgment of the district court should be reversed.

Respectfully submitted.

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